Supreme Court, U. S.
FILED
SEP 19 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-469

PATRICIA DINKO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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October Term, 1978

No.

PATRICIA DINKO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the United States Supreme Court.

Petitioner, Patricia Dinko, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Eastern District of New York convicting her of the crimes of distributing a controlled substance under 21 U.S.C. §841(a)(1) and conspiracy to do so (21 U.S.C. §846), after trial before Costantino, J., and a jury.

OPINION BELOW

The Court of Appeals affirmed the judgment of the district court in open court in an oral opinion. A petition for rehearing with suggestion for rehearing *en banc* was denied, with United States Circuit Judge Oakes dissenting from the denial of rehearing *en banc*.

JURISDICTION

The order of the Court of Appeals denying rehearing was entered on July 11, 1978.

An application for an extension of time within which to file this petition was made by other counsel, and was denied. Petitioner was informed of this denial on August 7, 1978; she retained and informed her present counsel of the denial on August 9, 1978.

The jurisdiction of the Court is invoked under 21 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. What is the proper, constitutional standard upon which to measure the performance of an attorney against a claim of denial of effective assistance of counsel?

2. What is the proper scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to effective assistance of counsel by joint representation?

STATEMENT OF THE CASE

Patricia Dinko, and her husband and co-defendant, were charged on June 7, 1976, in a two-count indictment filed in the United States District Court, Eastern District of New York, with

one count of distributing a controlled substance, under 21 U.S.C. §841(a)(1) and one count of conspiracy to violate that section under 21 U.S.C. §846.

On the date set for trial, June 13, 1977, one attorney, Thomas Manning, Esq., with offices in New York, New York, retained by and appearing on behalf of petitioner stated to the court that he was representing Patricia Dinko, the petitioner. Another attorney, Salvatore Quagliata, Esq., with offices in Queens, New York, retained supposedly to represent her co-defendant-husband, stated to the court that he was representing Andrew Dinko, the petitioner's husband.

Patricia Dinko's purported attorney, although present in the courtroom throughout the trial, never stated another word on the record! He never spoke to the jury, or to the court; never made an objection to testimony, never questioned a witness; nor did he participate in any other manner in the trial below. Instead, the other attorney, who had stated to the court that he represented the co-defendant, and who filed an appearance for only Andrew Dinko, conducted the attempted "joint defense" of both petitioner and her co-defendant. (This was done without the making of any motions either prior to trial, or following the jury verdict. Although electronic surveillance was employed in the case, no motions were made with respect to this issue either.)

In spite of the fact that Mr. Manning appeared for and stated on the record that he represented the petitioner, it is apparent from as early as counsel's opening remarks to the jury, that Mr. Quagliata was conducting the defense for both defendants. The trial court, however, at no time made inquiry into the circumstances surrounding this "joint representation or defense," but rather, permitted the attorney for one defendant to represent both defendants. At no place in the record does it appear that petitioner ever consented to relegate her defense to her husband's attorney; that she was ever informed by the trial

court of her right to or the advisability of having her counsel conduct her defense; or that she was ever questioned as to whether it was her intent to participate in a joint defense conducted by her co-defendant's attorney.

Point I of Petitioner's Brief to the United States Court of Appeals argued:

> "THE DEFENDANTS WERE DEPRIVED OF THEIR RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY VIRTUE OF THEIR JOINT REPRESENTATION BY ONE ATTORNEY."

It was argued by petitioner that "it was error not to inquire into and hold a hearing on the conflict issue" and that "the Government cannot show that the defendants were not prejudiced by the joint representation of them by one attorney." (Appellant's Brief in the United States Court of Appeals at 19, 23).

The Government argued, in Point I of its brief that:

> "The Dinkos were represented by separate counsel."

It was submitted that "under the circumstances, it is reasonable to assume that Mr. Quagliata and Mr. Manning, after consultation with the Dinkos, decided that each of their respective client's interests would best be served by presenting a united front to the jury and thus elected to have only one lawyer actively conduct the defense case." (Brief for Appellee in the United States Court of Appeals at 18-19).

Although there was no opinion in the circuit court, Judge Oakes dissented from the denial of the petition for re-hearing *en banc*, citing his dissent in *Rickenbacker v. Warden*, 550 F.2d 62

(2d Cir. 1976) in which he criticized the continued adherence by the Second Judicial Circuit to the "mockery of justice" standard by which to measure a claim of denial of the right to the effective assistance of counsel.

REASONS FOR GRANTING THE WRIT

The fundamental and important right to effective assistance of counsel, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, has been denied to petitioner. This denial of effective assistance of counsel is found in three separate aspects of the record.

First, although there was an attorney who entered an appearance on behalf of Mrs. Dinko, he did not participate in any manner in the trial. For all intents and purposes, petitioner was not represented by him but was instead represented by her co-defendant's attorney. The co-defendant's attorney was the one who, purporting to speak for both defendants, opened to the jury, conducted the cross-examination, examined all witnesses and summed up to the jury.

Second, there was, therefore, joint representation of petitioner and her co-defendant by one attorney without any inquiry by the trial court to ascertain the intelligence of the choice to proceed with one attorney.

Third, that attorney failed to measure up to the minimum standards of competency against which a claim of denial of effective representation by counsel should be measured.

If this Court were to find, after a full review of the facts herein, that petitioner was represented by independent counsel from that who represented her co-defendant, then the performance of her attorney, Mr. Manning, must be weighed against the standards demanded by the United States Constitution for effective assistance of counsel.

There is a clear conflict among the circuits as to the definition of the proper standard for effective assistance of counsel. The Second Circuit adheres to the so-called "mockery of justice" standard, *Rickenbacker v. Warden,* 550 F.2d 62 (2d Cir. 1976). The views of the individual circuits, and this Court have been stated by Circuit Judge Smith to be as follows:

> "The District of Columbia Circuit . . . has now said that the test is whether the defendant had 'reasonably competent assistance of an attorney acting as his diligent conscientious advocate.' *United States v. DeCoster,* 159 U.S. App. D.C. 326, 487 F.2d 1197, 1202 (1973). The Third Circuit says 'the standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place.' *Moore v. United States,* 432 F.2d 730, 736 (3d Cir. 1970) (en banc). The Fifth Circuit has said the test is having 'counsel reasonably likely to render and rendering reasonably effective assistance.' *United States v. Fessel,* 531 F.2d 1275, 1278 (5th Cir. 1976). The Sixth Circuit has also adopted this standard. *United States v. Toney,* 527 F.2d 716, 720 (6th Cir. 1975). The Seventh Circuit has said that the attorney's performance must meet 'a minimum professional standard.' *United States ex. rel. Williams v. Twomey,* 510 F.2d 634, 640 (7th Cir.), cert. denied sub nom, *Sielaff, Corrections Director v. Williams,* 423 U.S. 876, 96 S. Ct. 148, 46, LEd. 2d 109 (1975). The Eighth Circuit has said 'the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar.' *Johnson v. United States,* 506 F.2d 640, 646 (8th Cir.), cert. denied, 420 U.S. 978, 95 S. Ct. 1404, 43 L.Ed. 2d 659 (1974).

> In the context of cases where a defendant claims he pleaded guilty because he had incompetent counsel, the Supreme Court has held that the defendant must show that his attorney's advice was 'outside the range of competence demanded of attorneys in criminal cases.' *Tollett v. Henderson,* 411 U.S. 258, 268, 93 S. Ct. 1602, 1609, 36 L.Ed. 2d 235 (1973), quoting *McMann v. Richardson,* 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L.Ed. 2d 763 (1970)." *Rickenbacker v. Warden, supra,* at 65-66 (2d Cir. 1976).

This case then presents an opportunity for this Court to resolve these conflicts and set forth a uniform and proper standard against which claims of ineffective assistance of counsel should be measured.

A purported defense by a sphinx-like, mute attorney, who failed to conduct any defense, or even speak for his client is a "mockery of justice", and additionally, fails to meet the standard of "reasonable competency."

The Government below adopted the position that Patricia Dinko was indeed represented by Mr. Manning, and that she was not represented by Andrew Dinko's attorney, Mr. Quagliata. It was argued that the reason for Mr. Manning standing mute during the entire trial "was apparently a strategic and tactical defense decision." (Brief for Appellee at 18).

If this be the case, even though there is not a word in the record evidencing this assumption, there can be no doubt that Patricia Dinko was denied her constitutional right to effective assistance of counsel.

An attorney cannot simply abdicate his responsibility and satisfy his duty to his client by subsuming, unreservedly, his client's interests to those of another attorney's client. Although

two attorneys were seated at the defense table, this does not, in and of itself, require a finding of separate counsel. The inquiry must be made as to whether the representation was, in actuality, separate. *Cf., United States v. Donahue,* 560 F.2d 1039 (1st Cir. 1977).

Dual representation "is fraught with risk of conflict and should be approached with caution by the parties and by counsel". *United States v. Lawkin,* 568 F.2d 98, 101 (8th Cir. 1977).

Last term, this Court noted the existence of a conflict among the circuits as to how strong a showing of conflict must be made, or how certain the reviewing court must be that the asserted conflict existed, before it will conclude that the defendants were deprived of their right to effective assistance of counsel. *Holloway v. Arkansas,* ____ U.S. ____, 55 L.Ed. 2d 426, 434 (1978).

Although determining that reversal is automatic "whenever a trial court improperly requires joint representation over timely objection," *Id.* at 437, this court left unresolved by *Holloway* the additional clear conflict among the circuits:

> "with respect to the scope and nature of the affirmative duty of the trial judge to assure that defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests." *Holloway v. Arkansas, supra,* 55 L.Ed. 2d at 434.

The trial court below made no attempt whatever to ascertain whether the petitioner chose her counsel "intelligently . . . with knowledge of any possible conflict," *United States v. Carrigan,* 543 F.2d 1053, 1057 (2d Cir. 1976); nor was inquiry made as to whether petitioner intended a joint defense by her co-defendant's attorney with knowledge of the dangers and consequences inherent therein. *United States v. Levy,* 577 F.2d 200, 210-211 (3rd Cir. 1978).

The conflict between the interests of the defendants herein should have been thrust home to the trial court at the moment the one active defense counsel announced that each defendant would take the stand and testify on his and her own behalf. Even if that announcement escaped the attention of the trial court, the fact that only one defendant actually took the stand clearly required the district court to make inquiry even under the most lax test of the trial court's obligations. As Chief Judge Lumbard stated:

> "And if, where two defendants are represented by the same attorney, one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable." *Morgan v. United States,* 396 F.2d 110, 114 (2d Cir. 1968).

Although the prejudice to the testifying defendant, petitioner herein, "is not as readily apparant, (it) is nonetheless real and requires, in our view, a reversal of his conviction as well. . . ." *United States v. Carrigan,* 543 F.2d 1053, 1057 (2d Cir. 1976); *United States v. DeBerry,* 487 F.2d 448, 453 (2d Cir. 1973).

Finally, the performance of the attorney who conducted the defense at the trial must be measured to ascertain whether the petitioner received effective assistance of counsel. Once again, it is clear that the attorney's performance does not measure up to any "competency" standard. The attorney made no pre-trial motions — discovery, suppression or otherwise. He failed to move for judgment of acquittal at the end of the Government's case, nor did he poll the jury at the rendition of the verdicts. He failed to inform the trial court of the potential conflict when he realized that only one defendant would testify and he failed, without explanation, to keep his promise to the jury that both defendants would testify. These failures to avail himself of some

of the most elemental procedures of criminal advocacy should be measured against a uniform standard applicable to all defendants in every federal district court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to place in harmony the conflicting rules of the various circuits as to the standard to be applied with respect to the adequacy of counsel in criminal cases, and the duty of the trial court to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation.

Respectfully submitted,

IRA LEITEL
DAVID JAROSLAWICZ
Attorneys for Petitioner

IRA LEITEL
CAROL MELLOR
On the Petition

APPENDIX

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of January, One thousand nine hundred and seventy-eight.

PRESENT: HON. LEONARD P. MOORE

HON. J. JOSEPH SMITH

HON. WALTER R. MANSFIELD,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDREW DINKO, a/k/a Kelley, PATRICIA DINKO, a/k/a Patricia Mushington, JOSEPH BOYD, RAYMOND FILES, a/k/a Leroy Files, a/k/a Coco,

Defendants,

ANDREW DINKO, a/k/a Kelley, PATRICIA DINKO, a/k/a Patricia Mushington,

Defendants-Appellants.

Judgment

77-1399

77-1400.

Appeal from the United States District Court for the District of Eastern New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER,
Deputy Clerk

ORDER ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of July, one thousand nine hundred and seventy-eight.

PRESENT: HONORABLE WALTER R. MANSFIELD

HONORABLE J. JOSEPH SMITH

HONORABLE LEONARD P. MOORE

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ANDREW DINKO, PATRICIA DINKO,

Defendants-Appellants.

77-1399

77-1400.

A petition for a rehearing having been filed herein by counsel for the appellants

Order on Petition for Rehearing

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk

ORDER ON REHEARING *EN BANC*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of July, one thousand nine hundred and seventy-eight.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDREW DINKO, PATRICIA DINKO,

Defendants-Appellants.

77-1399

77-1400.

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellants Andrew Dinko and Patricia Dinko, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Oakes dissents from the denial of rehearing *en banc* on the basis of his dissenting opinion in *Rickenbacker v. Warden,* 550 F. 2d 62, 67 (1977).

IRVING R. KAUFMAN,
Chief Judge